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The Property Rights of Meretricious Spouses: The Effect of the New No Punishment Policy Indicated by the Consenting Adults Bill

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COMMENTS

THE PROPERTY RIGHTS OF MERETRICIOUS SPOUSES: THE EFFECT OF THE NEW "NO PUNISHMENT" POLICY INDICATED BY THE CONSENTING ADULTS BILL*

> The sole question for decision is whether a woman has thus, by further defilement of her own character, knowingly formed an illicit alliance with an unmoral and degraded wretch, may enforce her claim to a share in the acquets and gains of her paramour accumulated during the years of her debasement.[1]

INTRODUCTION

An individual[2] who cohabits with another person knowing that the two are not married is a meretricious spouse.[3] The property rights of meretricious spouses in California have been defined in large part by two California Supreme Court decisions, *Vallera v. Vallera*[4] and *Keene v. Keene*.[5] Under *Vallera* and *Keene*, meretricious spouses have not been permitted to claim, by analogy to a valid marriage, half the property accumulated during the relationship.[6] Thus, their remedies for obtaining an interest in accumulated property have been very limited. *Vallera* and *Keene* allow meretricious cohabitors to

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* *As this issue went to press the California Supreme Court decision was filed in Marvin v. Marvin, No. 30520 (Cal. Sup. Ct., decided Dec. 27, 1976). In* Marvin *the court concluded that express and implied contracts, partnership or joint venture agreements, and other tacit understandings between meretricious spouses will be enforced. The majority specifically authorized the use of the doctrine of quantum meruit and constructive or resulting trusts where warranted.* Id., *slip op. at 2. The reasoning of* In re *Marriage of Cary, 34 Cal. App. 3d 345 (1973), was disapproved.* Id. *at 35. In light of the problems trial courts will face in applying* Marvin, *the discussion in this Comment of earlier cases and the Consenting Adults Bill may offer useful guidance.*

1. Vallera v. Vallera, 126 P.2d 639 (Cal. Dist. Ct. App. 1942) (vacated).

2. Plaintiffs of both sexes have had their property rights partially determined by their meretricious status. *See, e.g.*, Barlow v. Collins, 166 Cal. App. 2d 274, 333 P.2d 64 (1958) (male meretricious spouse). Because most of the meretricious spouses in California cases have been women, however, and for purposes of convenience, feminine pronouns are used throughout this Comment where the reference is not to a specific spouse.

3. *See, e.g., In re* Marriage of Cary, 34 Cal. App. 3d 345, 349, 109 Cal. Rptr. 862, 864 (1973). *See* note 19 *infra*.

4. 21 Cal. 2d 681, 134 P.2d 761 (1943).

5. 57 Cal. 2d 657, 371 P.2d 329, 21 Cal. Rptr. 593 (1962).

6. Keene v. Keene, 57 Cal. 2d 657, 662, 371 P.2d 329, 331-32, 21 Cal. Rptr. 593, 595-96 (1962); Vallera v. Vallera, 21 Cal. 2d 681, 685, 134 P.2d 761, 762-63 (1943).

recover only on the basis of express agreements to pool and share property, or funds contributed toward the purchase of the accumulated assets at issue.[7] Several other forms of recovery were disallowed.[8]

In 1973, a California appellate court decision, *In re Marriage of Cary*,[9] broke from the *Vallera-Keene* rule. The First District Court of Appeal concluded that it was forced to deviate from the accepted *Vallera-Keene* doctrine because of a legislative policy change reflected in the 1970 Family Law Act.[10] The *Cary* court pointed out that the reason for the California decisions regarding the property rights of meretricious spouses had been the courts' reluctance to grant relief to parties engaged in a "sinful" relationship.[11] With the passage of the Family Law Act of 1970, the *Cary* majority held, property division could no longer be refused to a meretricious spouse engaged in a "family-type" relationship: the Family Law Act had announced a new public policy which eliminated "sinfulness" or "guilt" of the parties as a consideration in determining family property rights, and thereby undercut the rationale of the *Vallera-Keene* rule.[12]

The *Cary* decision has been criticized as a misinterpretation of the Family Law Act.[13] Critics offer convincing arguments that the legislature did not intend to allow meretricious spouses to recover under the provisions of the act,[14] and two subsequent court of appeal decisions have rejected the *Cary* reasoning.[15]

While it appears that the Family Law Act does not require a change in California rules regarding meretricious spouses,

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7. Keene v. Keene, 57 Cal. 2d 657, 662, 371 P.2d 329, 331-32, 21 Cal. Rptr. 593, 595-96 (1962); Vallera v. Vallera, 21 Cal. 2d 681, 685, 134 P.2d 761, 762-63 (1943).

8. *See* notes 79-98 and accompanying text *infra*.

9. 34 Cal. App. 3d 345, 109 Cal. Rptr. 862 (1973).

10. *Id.* at 353, 109 Cal. Rptr. at 866.

11. *Id.* at 349-50, 109 Cal. Rptr. at 864.

12. *Id.* at 352-53, 109 Cal. Rptr. at 866.

13. Brief for H. Kay, J. Sutter & D. Walker as Amicus Curiae at 29-49, Marvin v. Marvin, *appeal docketed*, No. 30520, Cal. Sup. Ct., Sept. 17, 1975 [hereinafter cited as Amicus Brief]; Comment, *In re Cary: A Judicial Recognition of Illicit Cohabitation*, 25 HAST. L.J. 1226, 1232-42 (1974); Comment, *In re Marriage of Carey [sic]: The End of the Putative-Meretricious Spouse Distinction in California*, 12 S.D.L. REV. 436, 440-48 (1975); Note, *In re Marriage of Cary: Equitable Rights Granted to the Meretricious Spouses*, 9 U.S.F.L. REV. 187, 193-99 (1974).

14. Amicus Brief, *supra* note 13, at 29-30; Comment, *In re Cary: A Judicial Recognition of Illicit Cohabitation*, 25 HAST. L.J. 1226, 1235 (1974); Comment, *In re Marriage of Carey* [sic]: *The End of the Putative-Meretricious Spouse Distinction in California*, 12 S.D.L. REV. 436, 448 (1975); Note, *In re Marriage Of Cary: Equitable Rights Granted to the Meretricious Spouses*, 9 U.S.F.L. REV. 187, 199 (1974).

15. *See* notes 138-43 and accompanying text *infra*.

there is a definite possibility that the legislature may have undermined the *Vallera-Keene* doctrine when it passed the Consenting Adults Bill, Assembly Bill Number 489,[16] in the spring of 1975.

The Consenting Adults Bill removes criminal sanctions from certain forms of private consensual sexual behavior and adulterous cohabitation.[17] In passing the bill, the legislature seems to have formally recognized that personal relationships between consenting adults are in an area of privacy where the government should not intrude.[18] It follows that the state no longer has a legitimate concern with the "sinfulness" of a meretricious union when determining whether the parties have valid property rights arising out of the relationship.

The purpose of this comment is to assess the potential effect of the new "no punishment" policy of the Consenting Adults Bill on California's laws regarding meretricious spouses. The supreme court and appellate court cases dealing with meretricious spouses will be analyzed in order to illustrate the court's reliance on prejudice and social policy that are no longer appropriate or valid.[19] The reasoning of these cases will be reexamined, and changes necessary to bring this segment of California law into conformity with the state's new "no punishment" policy will be suggested.

THE VALLERA-KEENE RULE

California community property laws award one half the community property accumulated during marriage to each spouse upon a marital dissolution.[20] By analogy to the community property system, the right to half the property accumulated during the relationship through the joint efforts of the parties has been extended to those persons who thought they were married, but who subsequently discovered that their mar-

16. Cal. Stats. (1975), ch. 71, at 144 (West Leg. Serv.).

17. *Id.*

18. *See* notes 148-52 and accompanying text *infra*.

19. The view that the California Supreme Court and the District Courts of Appeal hold of unmarried cohabitors is inherent in the legal term by which they are described, "meretricious." The word "meretricious" has been defined as:

> (1) of or relating to a prostitute: having a harlot's traits . . . . [or]
>
> (2) exhibiting synthetic or spurious attractions: based on pretense or insincerity: cheaply ornamental.

Webster's Third New International Dictionary (P. Gove ed. 1967). The court's legal conclusion is presumed in its terminology.

20. CAL. CIV. CODE § 4800 (West 1970). Community property is defined to be "all real property situated in this state and all personal property wherever situated ac-

riage was void[21] or voidable.[22] Because these individuals, known as "putative" spouses, believed in good faith that they were married, courts have allowed them to recover based on their expectation that they are entitled to half the "community property."[23] But the California courts have declined to apply the analogy to protect the meretricious spouse.

Vallera v. Vallera

In *Vallera v. Vallera*,[24] the plaintiff cohabited with the defendant for a period of at least three years beginning in May

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quired during the marriage by a married person while domiciled in this state. . . ." *Id.* § 5110 (West Supp. 1975).

21. Feig v. Bank of Am., 5 Cal. 2d 266, 54 P.2d 3 (1936) (husband unaware of "wife's" secret divorce); Figoni v. Figoni, 211 Cal. 354, 295 P. 339 (1931) (incestuous marriage); Schneider v. Schneider, 183 Cal. 335, 191 P. 533 (1920) (contrary to "wife's" belief, her marriage to her former husband had never been dissolved); Santos v. Santos, 32 Cal. App. 2d 62, 89 P.2d 164 (1939) (failure to meet the requirement of solemnization).

22. Sanguinetti v. Sanguinetti, 9 Cal. 2d 95, 69 P.2d 845 (1937) (marriage annulled on grounds that wife's prior marriage had not been dissolved as she believed it had); Coats v. Coats, 160 Cal. 671, 118 P. 441 (1911) (marriage annulled on grounds of wife's physical incapacity).

The putative spouse's right to half the "quasi-marital" property upon dissolution of the relationship was codified in 1970 in California Civil Code section 4452, part of the Family Law Act. CAL. CIV. CODE § 4452 (West Supp. 1976). A putative spouse's property rights upon the death of her spouse are still founded on case law. *E.g.*, Feig v. Bank of Am., 5 Cal. 2d 266, 54 P.2d 3 (1936) (surviving putative spouse awarded all the "community property"); Sousa v. Freitas, 10 Cal. App. 3d 660, 89 Cal. Rptr. 485 (1970) (property rights of putative spouse when property must be divided between herself and a legal spouse).

23. *See, e.g.*, Schneider v. Schneider, 183 Cal. 335, 339-40, 191 P. 533, 535 (1920); Coats v. Coats, 160 Cal. 671, 675, 118 P. 441, 443 (1911). In *Schneider* the court stated:

> [W]e agree with the Texas courts that the common-law rule as to the consequences of a void marriage upon the mutual property rights of the parties to it is inapplicable where the community property regime prevails. This conclusion is dictated by simple justice, for where persons domiciled in such a jurisdiction, believing themselves to be lawfully married to each other, acquire property as a result of their joint efforts, they have impliedly adopted, as is said in the Texas case cited, the rule of an equal division of their acquisitions, and the expectation of such a division should not be defeated in the case of innocent persons.

183 Cal. at 339-40, 191 P. at 535.

It is interesting to note, however, that although courts labored to fulfill the expectations of putative spouses, purporting to grant them property rights by analogy to the community property system, they refused to award putative spouses alimony. Amicus Brief, *supra* note 13, at 9, *citing* Sanguinetti v. Sanguinetti, 9 Cal. 2d 95, 100, 69 P.2d 845, 847 (dictum stating that a putative spouse has no right to alimony). *See* Luther & Luther, *Support and Property Rights of the Putative Spouse*, 24 HAST. L.J. 311 (1973). Putative spouses acquired their right to support with the enactment of Civil Code Section 4455, part of the Family Law Act. CAL. CIV. CODE § 4455 (West Supp. 1976).

24. 21 Cal. 2d 681, 134 P.2d 761 (1943).

of 1936.[25] The plaintiff brought an action for separate maintenance and for a division of the community property, based on an alleged common law marriage contracted in Michigan on December 16, 1938.[26] The trial court determined that the common law marriage had never existed.[27] Alternatively, it found that during the entire period of the cohabitation, the plaintiff believed that the defendant was married to another woman.[28]

The *Vallera* court, asked to extend community property rights to a meretricious spouse,[29] refused to do so, relying on a previous decision, *Flanagan v. Capital National Bank*,[30] which distinguished meretricious from putative spouses:

> The controversy is thus reduced to the question whether a woman living with a man as his wife but with no genuine belief that she is legally married to him acquires by reason of cohabitation alone the rights of co-tenant in his earnings and accumulations during the period of their reltationship. It has already been answered in the negative. Equitable considerations arising from the reasonable expectation of the continuation of benefits attending the status of marriage entered into in good faith are not present in such a case.[31]

The essence of the *Vallera* court's distinction between the property rights of the putative and those of the meretricious spouse was the difference it perceived in the reasonable expectations held by each. A putative spouse believes he or she is married, and reasonably expects to receive the benefits necessarily incident to marriage.[32] However, the court considered a similar expectation held by a meretricious spouse to be unreasonable.[33] Knowing she is not married, a meretricious spouse cannot expect to be accorded the protection of marital property laws.[34] Justice Traynor's use of the phrase "by reason of cohabitation *alone*"[35] indicates that cohabitation, by itself, is

25. *Id.* at 683, 134 P.2d at 762.
26. *Id.* at 682, 134 P.2d at 761.
27. *Id.* at 682-83, 134 P.2d at 762.
28. *Id.* at 683, 134 P.2d at 762.
29. *Id.* at 684, 134 P.2d at 762.
30. 213 Cal. 664, 3 P.2d 307 (1931).
31. Vallera v. Vallera, 21 Cal. 2d 681, 684-85, 134 P.2d 761, 762-63 (1943), *citing* Flanagan v. Capital Nat'l Bank, 213 Cal. 664, 3 P.2d 307 (1931).
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* at 684, 134 P.2d at 763.

not to be considered equivalent to marriage; cohabitators who lack the good faith of the putative relationship are not entitled to the judicial relief afforded married couples through the community property laws solely because they are living together.[36]

Nevertheless, the *Vallera* majority recognized that meretricious spouses may recover an interest in property accumulated without analogizing to marriage.[37] In dictum, the court mentioned that an express agreement to pool earnings and share equally in accumulations is enforceable.[38] Similarly, the court recognized that a meretricious spouse may recover a share in property jointly accumulated "in the proportion that her funds contributed toward its acquisition,"[39] even if there is no express agreement to that effect.[40]

From Vallera to Keene

The appellate and supreme court cases decided between the *Vallera* and *Keene* decisions discuss three theories of recovery for a meretricious spouse: (1) express arrangements either to pool earnings and share in accumulations,[41] or to compensate for services rendered;[42] (2) implied contracts;[43] and (3) recovery based on consideration furnished for the acquisition of property.[44] Most of the cases purport to rely on *Vallera* and

36. *Id.* at 684-85, 134 P.2d at 762-63.

37. *Id.* at 685, 134 P.2d at 763.

38. *Id.*

39. *Id.*

40. *Id.* The *Vallera* opinion does not state whether the remedies mentioned for meretricious spouses were meant to be exclusive. The court listed two valid grounds for recovery without indicating whether or not other bases of recovery were to be precluded. By not clearly indicating its intention, the court paved the way for later appellate decisions which interpreted its listing of remedies to be all inclusive. *See* Lazzarevich v. Lazzarevich, 88 Cal. App. 2d 708, 200 P.2d 49 (1948); Oakley v. Oakley, 82 Cal. App. 2d 188, 185 P.2d 848 (1947).

41. *See, e.g.*, Weak v. Weak, 202 Cal. App. 2d 632, 21 Cal. Rptr. 9 (1962); Ferguson v. Schuenemann, 167 Cal. App. 2d 413, 334 P.2d 668 (1959); Barlow v. Collins, 166 Cal. App. 2d 274, 333 P.2d 64 (1958); Croslin v. Scott, 154 Cal. App. 2d 767, 316 P.2d 755 (1957); Ferraro v. Ferraro, 146 Cal. App. 2d 849, 304 P.2d 168 (1956); Cline v. Festersen, 128 Cal. App. 2d 380, 275 P.2d 149 (1954); Bridges v. Bridges, 125 Cal. App. 2d 359, 270 P.2d 69 (1954); Profit v. Profit, 117 Cal. App. 2d 126, 255 P.2d 25 (1953); Garcia v. Venegas, 106 Cal. App. 2d 364, 235 P.2d 89 (1951).

42. *See* Garcia v. Venegas, 106 Cal. App. 2d 364, 235 P.2d 89 (1951); Lazzarevich v. Lazzarevich, 88 Cal. App. 2d 708, 200 P.2d 49 (1948); Oakley v. Oakley, 82 Cal. App. 2d 188, 185 P.2d 848 (1947).

43. *See* Lazzarevich v. Lazzarevich, 88 Cal. App. 2d 708, 200 P.2d 49 (1948); Oakley v. Oakley, 82 Cal. App. 2d 188, 185 P.2d 848 (1947).

44. *See* McQuin v. Rice, 88 Cal. App. 2d 914, 199 P.2d 742 (1948); Baskett v. Crook, 86 Cal. App. 2d 355, 195 P.2d 39 (1948).

quote the dictum in the case as controlling law.[45]

Express Agreement. California appellate courts were liberal in recognizing express agreements to pool earnings and share in accumulations during the relationship or to compensate for services rendered. All courts reiterated the rule set out in a pre-*Vallera* supreme court case, *Trutalli v. Meraviglia*,[46] that an express agreement will be enforced only if not founded on the illicit relationship.[47] However, this limitation was narrowly construed. In *Bridges v. Bridges*,[48] the Third District Court of Appeal seemed to suggest that it would consider an agreement to be founded on the meretricious relationship only if the parties expressly testified that that was the case. The court stated:

> Nowhere is it expressly testified to by anyone that there was anything in the agreement for the pooling of assets and the sharing of accumulations that contemplated meretricious relations as any part of the consideration or as any object of the agreement.[49]

In fact, only one decision, *Hill v. Estate of Westbrook*,[50] refused to enforce an express agreement where the agreement was pleaded. The supreme court in *Hill* denied recovery for the value of the meretricious spouse's services, concluding that it could not overturn as a matter of law the appellate court's holding that the spouse's services were rendered gratuitously or in contemplation of the illicit relationship.[51] The appellate court felt bound to reach that conclusion because the plaintiff unwisely sought to recover for "living with [the decedent] as man and wife" and "bearing decedent two children" as well as "performing the usual duties of a housewife."[52] The court of

45. *See, e.g.*, Cline v. Festersen, 128 Cal. App. 2d 380, 384, 275 P.2d 149, 152 (1954); Bridges v. Bridges, 125 Cal. App. 2d 359, 362, 270 P.2d 69, 71 (1954); Garcia v. Venegas, 106 Cal. App. 2d 364, 369, 235 P.2d 89, 92 (1951).

46. 215 Cal. 698, 12 P.2d 430 (1931).

47. *Id.* at 701-02, 12 P.2d at 431-32.

48. 125 Cal. App. 2d 359, 270 P.2d 69 (1954).

49. *Id.* at 363, 270 P.2d at 71. The court also mentioned that an agreement could be implied from the findings of fact. *Id.* at 362, 270 P.2d at 70. However, the majority seemed to emphasize that neither party had testified that the agreement was founded on the meretricious relationship; this fact was noted twice in the opinion. *Id.* at 362-63, 270 P.2d at 71.

50. 95 Cal. App. 2d 599, 602-03, 213 P.2d 727 (1950), *aff'd*, 39 Cal. 2d 458, 247 P.2d 19 (1952).

51. 39 Cal. 2d at 461-62, 247 P.2d at 21.

52. 95 Cal. App. 2d at 600-01, 213 P.2d at 728. The appellate decision indicates that the meretricious plaintiff would have been allowed to recover for the services she

appeal had to assume that a portion of the money awarded was to compensate the plaintiff for services which were definitely based on the meretricious relationship. Consequently, the state's policy against illicit relationships required that recovery be denied.[53]

Implied Contract. The second group of cases dealing with remedies for meretricious spouses discusses recovery based on a "contract implied-in-law" theory. Two appellate cases examined this possibility, but both concluded that it was inapplicable.[54]

Quasi-contractual theory permits recovery in quantum meruit for the value of services rendered without request, so long as there is unjust enrichment and the services were performed with an expectation of payment.[55] Conceivably, a meretricious spouse renders services with no expectation of payment. Had the courts in the two appellate cases which discussed the possibility of a quasi-contract reached this conclusion, the holdings, if not persuasive, would at least be understandable.[56]

However, the possibility of recovering on an implied con-

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rendered which were not based on the relationship had the separate value of those services been determined by the trial court. *Id.* at 603, 213 P.2d at 730.

53. Another indication of the courts' liberality in recognizing express agreements is the findings of fact on which agreements have been based. Despite potential abuse, agreements have been founded primarily on the testimony of the meretricious spouse seeking recovery. Although evidence on almost all the issues was conflicting, the Third District Court of Appeal in Bridges v. Bridges, 125 Cal. App. 2d 359, 270 P.2d 69 (1954), found an express agreement on the basis of the plaintiff's statements and evidence that she and the defendant purchased and improved property. *Id.* at 361-62, 270 P.2d at 70. In Cline v. Festersen, 128 Cal. App. 2d 380, 275 P.2d 149 (1954), the plaintiff's testimony that in 1937 decedent told her "everything was to be 50-50" was construed to be an oral agreement to pool earnings and property and share equally in all accumulations. *Id.* at 382-83, 275 P.2d at 150-51. Similarly, the court in Ferraro v. Ferraro, 146 Cal. App. 2d 849, 304 P.2d 168 (1956), found an express agreement to pool earnings and to share in accumulations apparently based on the wife's testimony at the trial. The *Ferraro* court rejected the defendant's claim that the plaintiff's statements regarding the alleged agreement were inconsistent, holding that the defendant was interpreting plaintiff's testimony too narrowly. *Id.* at 851, 304 P.2d at 170.

54. Lazzarevich v. Lazzarevich, 88 Cal. App. 2d 708, 200 P.2d 49 (1948); Oakley v. Oakley, 82 Cal. App. 2d 188, 185 P.2d 848 (1947).

55. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 237 (1973); *see* Desny v. Wilder, 46 Cal. 2d 715, 735-37, 299 P.2d 257, 268-69 (1956); Santa Clara v. Robbiano, 180 Cal. App. 2d 845, 848-49, 5 Cal. Rptr. 19, 21 (1960).

56. The vacated opinion of the Second District Court of Appeal in Hill v. Estate of Westbrook, 95 Cal. App. 2d 599, 213 P.2d 727 (1950) is the only appellate decision discovered which actually stated that one of the reasons meretricious spouses cannot recover for services rendered on an implied contract theory is because of their inability to establish an expectation of payment. *Id.* at 602, 213 P.2d at 729.

tract was not dismissed because the courts found the meretricious spouses did not expect compensation. Rather, both courts denied quasi-contract recovery because the plaintiffs had no good faith belief in the marriage.[57]

In *Lazzarevich v. Lazzarevich*,[58] the court supported its holding denying a meretricious spouse recovery on an implied contract with a quotation from *Vallera*: in dealing with meretricious spouses there are no "equitable considerations arising from the reasonable expectation of the continuation of benefits attending the status of marriage entered into in good faith."[59] The court in *Oakley v. Oakley*,[60] dismissed a quasi-contract

57. Lazzarevich v. Lazzarevich, 88 Cal. App. 2d 708, 718-19, 200 P.2d 49, 55-56 (1948); Oakley v. Oakley, 82 Cal. App. 2d 188, 191-92, 185 P.2d 848-50 (1947).

58. 88 Cal. App. 2d 708, 200 P.2d 49 (1948). *Lazzarevich* is particularly interesting because the plaintiff was both a putative and a meretricious spouse for different periods of time. *Id.* at 712, 200 P.2d at 52. Plaintiff and defendant had married March 18, 1921. Later, marital difficulties arose and the defendant filed for divorce, the court granting an interlocutory decree on March 18, 1932. The parties had a reconciliation in July of 1935, and they lived for over ten years believing that they were married. However, pursuant to written instructions from defendant's attorney, a final decree of divorce had been entered on September 6, 1933, the existence of which first came to their attention when further domestic difficulties prompted the plaintiff to consult an attorney in 1945. From August 10, 1945, until the commencement of the action in August of 1946, the plaintiff was aware that the defendant was not her husband. Despite her discovery, she cohabited with him for eight more months during this period. *Id.*

As a first cause of action plaintiff sought to recover the value of her services in the home from her original reconciliation with the defendant in 1935 up until they permanently separated in April of 1946. *Id.* at 710, 200 P.2d at 50. In dealing with her claim, the *Lazzarevich* court distinguished between the years when she was a putative spouse and the eight months when she was a meretricious spouse. *Id.* at 713-19, 200 P.2d at 52-56.

During the discussion leading up to the court's holding that the plaintiff was entitled to recover for her years as a putative spouse, the court held that section 40 of the *Restatement of the Law of Restitution* was applicable. Section 40 dealt in pertinent part with recovery based on services rendered in reliance on a misstatement; the section did not indicate that it was meant to be used exclusively by parties in a domestic context. *Id.* at 715-16, 200 P.2d at 54. Consequently, the *Lazzarevich* court's citation to the Restatement shows that it actually considered whether the plaintiff had a legal basis on which to recover for her services, aside from her status as a good faith spouse. That is, the majority compared the plaintiff's situation with the general requirements for quasi-contract recovery, and held that recovery was appropriate because the requirements were fulfilled.

In contrast, when the court dismissed the plaintiff's claim for the value of her services rendered as a meretricious spouse, it never squarely faced the issue of whether the plaintiff fulfilled the requirements for recovery based on an implied contract. According to the decision, the plaintiff's meretricious status was dispositive. *Id.* at 718-19, 200 P.2d at 55-56.

59. *Id.* at 719, 200 P.2d at 55-56.

60. 82 Cal. App. 2d 188, 185 P.2d 848 (1947).

claim on the same reasoning.[61] Both decisions state that recovery is possible only if there is an express agreement.[62]

The *Lazzarevich-Oakley* interpretation of *Vallera* rests on the assumption that an expectation of payment is necessarily an expectation of a benefit "attending the status of marriage"—an assumption that is clearly specious. A meretricious spouse might reasonably expect compensation for services quite apart from any dependence on marital rights. The status of marriage is not a prerequisite to compensation for services rendered in a non-marital context. Consequently, the courts must have construed the *Vallera* decision to deny, as a matter of policy, any recovery based on a meretricious spouse's services in the absence of an express agreement. The *Vallera* opinion, which dealt only with the applicability of marital property laws, does not support such an interpretation.

Resulting Trust. The last remedy for meretricious spouses dissussed by appellate decisions after *Vallera* is the possibility of basing a recovery on consideration furnished for the purchase of property acquired during the relationship. The plaintiffs in both cases discussing this subject sought to have a resulting trust imposed upon the defendant's property.[63] The court interpreted the requirements for a resulting trust very strictly, perhaps indicating their general unwillingness to grant a meretricious spouse relief.

In *Baskett v. Crook*[64] the Third District Court of Appeal noted that in the absence of facts to the contrary, it is presumed that the holder of title to property is the owner.[65] The court stated that a resulting trust may only be established where there is clear and convincing evidence that it was the intention of the parties to create a trust.[66] Actually, the rule is that resulting trusts are imposed for the purpose of carrying out the parties' intentions—an entirely different proposition.[67] Consequently, it appears that the court imposed an additional unprecedented requirement on the meretricious spouse, which

61. *Id.* at 191-92, 185 P.2d at 850.

62. Lazzarevich v. Lazzarevich, 88 Cal. App. 2d 708, 719, 200 P.2d 49, 56 (1948); Oakley v. Oakley, 82 Cal. App. 2d 188, 192, 185 P.2d 848, 850 (1947).

63. McQuin v. Rice, 88 Cal. App. 2d 914, 915, 199 P.2d 742, 743 (1948); Baskett v. Crook, 86 Cal. App. 2d 355, 362, 195 P.2d 39, 44 (1948).

64. 86 Cal. App. 2d 355, 195 P.2d 39 (1948).

65. *Id.* at 362, 195 P.2d at 44.

66. *Id.*

67. *See, e.g.*, Walrath v. Roberts, 12 F.2d 443, 445 (1925); Laing v. Laubach, 233 Cal. App. 2d 511, 515, 43 Cal. Rptr. 537, 539 (1965).

she was unable to meet.

In reaching its decision, the *Baskett* court relied on *Bertelsen v. Bertelsen*,[68] a case in which the court has indicated its disdain for meretricious relationships by concluding that money contributed by the meretricious plaintiff was merely consideration for prostitution or a gift.[69] Apparently, the *Baskett* court held a similar view.

The court in *McQuin v. Rice*[70] refused to impose a resulting trust because none of the meretricious spouse's money could be traced to the property in dispute.[71] As in *Baskett*, the court noted that in the absence of evidence to the contrary, it must be assumed that the meretricious spouse's labor and contributions from his paycheck were intended as his share of the living expense or as gifts.[72]

Keene v. Keene

In *Keene v. Keene*,[73] plaintiff and defendant cohabitated in a meretricious relationship for a period of 18 years.[74] During this time the plaintiff performed many duties in connection with the defendant's business and commercial ventures as well as household management and the customary chores of a housewife.[75]

At the end of the relationship plaintiff brought an action

68. 7 Cal. App. 258, 94 P. 80 (1907).

69. *Id.* at 260-61, 94 P. at 80.

70. 88 Cal. App. 2d 914, 199 P.2d 742 (1948).

71. *Id.* at 918, 199 P.2d at 744.

72. *Id.* Thus, *Baskett* and *McQuin* in combination stand as a warning that meretricious spouses have difficulty establishing that their services were not intended as consideration for prositution or gifts when attempting to recover on a resulting trust theory.

73. 57 Cal. 2d 657, 371 P.2d 329, 21 Cal. Rptr. 593 (1962).

74. *Id.* at 660, 371 P.2d at 330, 21 Cal. Rptr. at 594.

75. *Id.* at 663 n.3, 669-70, 371 P.2d at 332 n.3, 336-37, 21 Cal. Rptr. at 596 n.3, 600-01. Evidence supported the fact that plaintiff undertook several additional jobs while the couple lived on a ranch acquired by the defendant prior to the beginning of the relationship. *Id.* From 1938 to 1946, the period that the couple lived on the ranch, the plaintiff singly cared for a large commercial turkey flock. *Id.* at 669, 371 P.2d at 336, 21 Cal. Rptr. at 600. During the lambing season she nursed back to health "orphan" lambs which otherwise would have died. *Id.* Furthermore, she helped the working hands clear land for cultivation as well as helping with the sowing and harvesting of commercial crops. *Id.* at 670, 371 P.2d at 336-37, 21 Cal. Rptr. at 600-01.

In 1946 the defendant sold the ranch, vastly improved from the time of its original purchase, for a very substantial sum. *Id.* at 670, 371 P.2d at 337, 21 Cal. Rptr. at 601. From that time until 1956 he engaged in real estate and furniture businesses. Some evidence was presented that the plaintiff also helped with these ventures. *Id.* at 661, 670, 371 P.2d at 330, 337, 21 Cal. Rptr. at 594, 601.

to "impress a trust upon defendant's property with respect to the proceeds of an alleged joint venture or partnership between defendant and herself."[76] Citing *Vallera* as authority, she contended that the trust should be imposed by reason of the duties she had performed for the defendant in excess of such usual spousal services as housekeeper, cook and homemaker.[77]

The *Keene* court denied the meretricious spouse's claim, concluding that her reliance on the *Vallera* opinion was misplaced.[78] The majority held that a recovery in the form of a resulting trust based on the plaintiff's personal services in the defendant's businesses did not come within the ambit of the *Vallera* rule.[79] The court reiterated the dictum in *Vallera* that a meretricious spouse is entitled to "share in the property jointly accumulated, in the proportion that her funds contributed toward its acquisition," but concluded that services alone were not valid consideration: "funds" meant money or property.[80]

After dismissing the possibility that recovery was appropriate under *Vallera*, the *Keene* court ruled that the plaintiff also was unable to fulfill resulting trust requirements established by other decisions.[81] Trust precedent required that the plaintiff show the precise amount of consideration that she paid as well as the total asset price.[82] The court held that the plaintiff could not meet this burden.[83] Furthermore, the majority noted that where services provide the consideration, those services must have been performed for a *grantor*, who subsequently transferred title to the *grantee* in payment.[84] The plaintiff's services, performed for the grantee, clearly did not satisfy these requirements.[85] The court observed that services justifying the imposition of a resulting trust must have been

76. *Id.* at 659, 371 P.2d at 330, 21 Cal. Rptr. at 594.

77. *Id.* at 659-60, 371 P.2d at 330, 21 Cal. Rptr. at 594.

78. *Id.* at 664, 371 P.2d at 333, 21 Cal. Rptr. at 597.

79. *Id.*

80. *Id.* at 663-64, 371 P.2d at 332-33, 21 Cal. Rptr. at 596-97. In support of this interpretation of *Vallera*, the *Keene* court relied on the dictionary definition of "funds," noting that one must assume that words are used in their most common sense. *Id.*

81. *Id.* at 665-68, 371 P.2d at 333-36, 21 Cal. Rptr. at 597-600.

82. *Id.* at 665, 371 P.2d at 333-34, 21 Cal. Rptr. at 597-98. The *Keene* court stated that a resulting trust may be imposed when either real or personal property is transferred to one party, if the consideration was provided by another. *Id.*

83. *Id.* at 665, 371 P.2d at 334, 21 Cal. Rptr. at 598.

84. *Id.* at 666-67, 371 P.2d at 334-35, 21 Cal. Rptr. at 598-99.

85. *Id.*

furnished at or before the purchase of the property. Even monetary contribution toward improvements on previously purchased real property have never justified the impositon of a resulting trust.[86]

Although most of the *Keene* majority's holding regarding the imposition of resulting trusts is consistent with prior case law,[87] the court's requirement that the grantor convey the property in payment for the beneficiary's services is an inaccurate representation of precedent. In *Dougherty v. California Kettlemen Oil Royalties, Inc.*,[88] cited by *Keene*, the plaintiff was awarded a resulting trust on the basis of obtaining a permit to prospect for oil and gas on recently reopened government lands.[89] To characterize the issuance of the permit as "payment" for the services rendered in procuring it is a strained interpretation of the case. Similarly, the court in *Stewart v. Douglass*[90] imposed a resulting trust where the plaintiff discovered a valuable mine on vacant federal property.[91] The mining claim that was subsequently recorded was not placed in the defendant's name in "payment" for the plaintiff's explorations.[92]

The *Keene* court also considered and rejected other possible forms of recovery for the plaintiff. Discussing the merits of contracts implied-in-fact and contracts implied-in-law, the court suggested that both remedies would have been available had the plaintiff complied with their requirements,[93] but the decision does not indicate which requirements were unfulfilled.

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86. *Id.* at 667, 371 P.2d at 335, 21 Cal. Rptr. at 599. *See* Comment, *Rights of the Putative and Meretricious Spouse in California*, 50 CALIF. L. REV. 866 (1962).

87. *See, e.g.*, Plass v. Plass, 122 Cal. 3, 13, 54 P. 372, 376 (1898) (general requirements); Woodside v. Hewel, 109 Cal. 481, 484-85, 42 P. 152, 153 (1895) (general requirements); Hellman v. Messer, 75 Cal. 166, 170, 16 P. 766, 768 (1888) (resulting trust improper based on improvement); Neusted v. Skernswell, 69 Cal. App. 2d 361, 368, 159 P.2d 49, 52 (1945) (resulting trust improper based on improvement).

88. 9 Cal. 2d 58, 69 P.2d 155 (1937).

89. *Id.* at 62-63, 69 P.2d at 157-58.

90. 149 Cal. 511, 83 P. 699 (1906).

91. *Id.* at 514, 83 P. at 700-01.

92. The rule implied by cases like Dougherty v. California Kettleman Oil Royalties, Inc., 9 Cal. 2d 58, 69 P.2d 155 (1937), and Stewart v. Douglass, 148 Cal. 511, 83 P. 699 (1906), is that any services rendered by a meretricious spouse before the date of acquisition of property which were contributed toward its acquisition will justify the impositon of a resulting trust. Although there is no case precedent to substantiate the argument, a "homemaking" meretricious spouse could argue that her services in the home which "freed" her spouse to earn the purchase price of a particular asset should justify a resulting trust recovery.

93. 57 Cal. 2d at 664-65, 371 P.2d at 333, 21 Cal. Rptr. at 597.

Examining the possibility of a contract implied-in-fact, the *Keene* majority noted that recovery is appropriate only where one party performs services for another with an expectation of payment under circumstances negating an inference of a gift. In a footnote, the decision lists several cases to support this point, none of which involve recovery for domestic work.[94] This suggests that recovery on an implied contract is limited to cases where the spouse performs work beyond the normal household duties. Since the plaintiff in *Keene* meets this requirement, it is unclear why recovery was denied. Possibly, the court decided that the services were not rendered with an expectation of payment, applying the usual presumption in a marital context that any services performed are intended as a gift.[95] However, there is nothing in the opinion to support this supposition.[96] Consequently, the circumstances under which recovery is appropriately based on a contract implied-in-fact are a matter of conjecture.

The court's discussion regarding contracts implied-in-law is equally unclear. To illustrate the requirements for recovery, the court noted that a putative spouse can recover the reasonable value of her services in excess of the support provided her if no "marital" property has been accumulated.[97] Since a meretricious spouse can never be a putative spouse by definition of terms, the reference to the "putative" requirement implies that meretricious spouses can never recover in quasi-contract.

The *Keene* court avoided discussing the principal issue—whether it should have established new precedent and allowed recovery by a meretricious spouse meeting the requirements for the remedy of quasi-contract. Because of the extensive services performed by the plaintiff in *Keene*, it is conceivable that quasi-contract would have been appropriate. The only

94. *Id.* at 664 n.4, 371 P.2d at 333 n.4, 21 Cal. Rptr. at 597 n.4.

95. *Compare* 54 CAL. JUR. 2d 692, *with* Gjurich v. Fieg, 164 Cal. 429, 129 P. 464 (1913). In the *Gjurich* opinion the court noted that it may be inferred, in the absence of an agreement to the contrary, that pecuniary compensation is not expected when one blood relative performs services for another. The court applied the inference to a meretricious relationship. 164 Cal. at 432, 129 P. at 465.

96. At the end of the court's discussion of resulting trusts, the decision does hint that there may be an implication that services performed by one cohabitor, in assisting in the operation of the other's business or trade, may be either a gift or a contribution toward their general living expenses. 57 Cal. 2d at 668, 371 P.2d at 336, 21 Cal. Rptr. at 600. However, the court's comment appears to be an afterthought, and its separation from the opinion's discussion of contracts implied-in-fact makes its pertinence questionable.

97. *Id.* at 664, 371 P.2d at 333, 21 Cal. Rptr. at 597.

difficulty, as with the contract implied-in-fact, would have been establishing an expectation of payment.[98]

The Keene Dissent

Justice Peters, dissenting, contended that the meretricious spouse was denied recovery because the majority felt that she had "sinned" by participating in the relationship. He urged the court not to adopt a rule whereby the plaintiff would be denied recovery even though the defendant had "sinned" in equal degree.[99]

Peters criticized two aspects of the majority decision: the court's misinterpretation of the *Vallera* holding and its discussion of resulting trusts. He observed that the *Keene* court misconstrued the dictum in *Vallera* relating to "funds contributed toward . . . acquisition" of property.[100] The *Keene* majority had concluded, primarily on the basis of a dictionary definition, that the term "funds" was meant to include money or property but not "services."[101] Justice Peters correctly pointed out that *Vallera* itself refutes that interpretation.

Two cases were cited by Justice Traynor in the *Vallera* opinion to support the possibility of a recovery based on "funds contributed." Both decisions, *Hayworth v. Williams*[102] and *Delamour v. Rodgers*,[103] recognized services as adequate consideration.[104]

Justice Peters noted that both *Hayworth* and *Delamour* were based on sound theory and public policy. In view of the fact that *Vallera* relied on the cases, Peters implied that recovery would have been allowed under a proper interpretation of *Vallera*. Arguing that an illicit cohabitation should not invalidate an enforceable legal right, he concluded that a meretricious spouse should be entitled to a portion of the assets accumulated during the relationship on the basis of services contributed toward their acquisition.[105]

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98. *See* Havighurst, *Services in the Home—A Study of Contract Concepts in Domestic Relations*, 41 YALE L.J. 386 (1932); Wade, *Restitution for Benefits Conferred Without Request*, 19 VAND. L. REV. 1183 (1966); Comment, *Quasi-Contracts—Relationships Raising Presumption of Gratuity*, 6 FORD. L. REV. 417 (1937).

99. 57 Cal. 2d at 668-69, 371 P.2d at 336, 21 Cal. Rptr. at 600.

100. *Id.* at 672, 371 P.2d at 338, 21 Cal. Rptr. at 602.

101. *Id.* at 663, 371 P.2d at 332-33, 21 Cal. Rptr. at 596-97.

102. 102 Tex. 308, 116 S.W. 43 (1909).

103. 7 La. Ann. 152 (1852).

104. Keene v. Keene, 57 Cal. 2d 657, 672, 371 P.2d 329, 338, 21 Cal. Rptr. 593, 602 (1962).

105. *Id.*

Justice Peters complained that the majority was overly concerned with legal theories and criticized the highly technical discussion,[106] noting that the essential principle is one of equity. Whether recovery is based on resulting trust, constructive trust, or equitable lien, the basic purpose is to "identify and impress upon certain property the beneficial rights that have arisen in an innocent party who in some way contributed to the acquisition, protection, or improvement of that property . . . ."[107]

Peters argued that the primary issue was whether consideration was furnished in whole or in part by one person and title taken in the name of another.[108] He observed that under usual contract and trust principles, consideration is recognized in the form of money, property, or services, and no equitable principle would justify the creation of a trust in favor of a person who furnished money with which to purchase property that would not also recognize the right of one who rendered services:[109]

> [The creation of a trust] is an inference based on common sense and on the implied intent of the parties. It certainly does no lasting harm to the law to indulge in the mild presumption that parties intend to deal fairly with each other and that such presumption will be enforced by presuming the intent to create a trust.[110]

Clearly, Justice Peters felt that a trust remedy was denied because the majority inappropriately weighed the "sinfulness" of the plaintiff in rendering its decision.

IN RE MARRIAGE OF CARY

Keene v. Keene[111] was not successfully challenged for over ten years. Then in 1973 the First District Court of Appeal decided *In re Marriage of Cary*,[112] which announced that *Keene* was no longer dispositive of the property rights of meretricious spouses in a "family" relationship.[113] The *Cary* court held that

106. *Id.* at 673-74, 371 P.2d at 339, 21 Cal. Rptr. at 603.

107. *Id.* at 674, 371 P.2d at 339, 21 Cal. Rptr. at 603, *quoting* Holder v. Williams, 167 Cal. App. 2d 313, 315, 334 P.2d 291, 292 (1959).

108. *Id.*

109. *Id.* at 674-75, 371 P.2d at 340, 21 Cal. Rptr. at 604.

110. *Id.* at 674, 371 P.2d at 339, 21 Cal. Rptr. at 603. *See* Comment, *Illicit Cohabitation: The Impact of the Vallera and Keene Cases on the Rights of the Meretricious Spouse*, 6 U.C.D.L. REV. 355 (1973).

111. 57 Cal. 2d 657, 371 P.2d 329, 21 Cal. Rptr. 593 (1962).

112. 34 Cal. App. 3d 345, 109 Cal. Rptr. 862 (1973).

113. *Id.* at 352-54, 109 Cal. Rptr. at 866-67.

the 1970 Family Law Act indicated a change in public policy, discarding the "guilt" of meretricious parties as a consideration in the determination of property rights where the parties shared a "family" relationship.[114] Accordingly, the *Keene* "guilt" rationale had been undercut and its rule superseded.[115]

In re Marriage of Cary

Paul Cary and Janet Forbes lived together for eight years and had four children. Although they never married, they held themselves out as a married couple, filing joint income tax returns, purchasing a home, obtaining credit, and generally transacting all business as husband and wife. Paul worked to support the family while Janet cared for the house and children. Throughout the relationship, Paul recognized the children as his own.[116]

The *Cary* court held that Paul's and Janet's cohabitation constituted a family relationship within the purview of the 1970 Family Law Act.[117] Accordingly, the court concluded that the act was intended to control the distribution of the family's property.[118] Recognizing that California's community property law ordinarily applied only to legally married parties, the court observed that community property principles have been extended to putative spouses, and noted that California had historically denied relief to meretricious spouses based on the absence of "equitable considerations": dealing with "guilty parties," the courts left them in the position in which they had placed themselves.[119]

Persuaded that a new public policy had been announced in the 1970 Family Law Act, the *Cary* majority held that the guilt of Paul and Janet's "family-type" relationship was immaterial. Consequently, it upheld the trial court's division of the property pursuant to Civil Code section 4800, which requires equal division of community and quasi-community property.[120]

114. *Id.*
115. *Id.*
116. *Id.* at 348, 109 Cal. Rptr. at 863.
117. *Id.*
118. *Id.* at 352-53, 109 Cal. Rptr. at 865-66.
119. *Id.* at 349-50, 109 Cal. Rptr. at 863-64.
120. *Id.* at 352-53, 109 Cal. Rptr. at 865-66.

Cary's Faulty Reasoning

In re Marriage of Cary is based on the erroneous conclusion that the Family Law Act, by eliminating the consideration of "sin" and "guilt" in determining the property rights of parties at dissolution of a marriage or a putative relationship, required the courts to adopt the same approach when dealing with the rights of a meretricious spouse.[121] An examination of the policy underlying the Family Law Act reveals that the *Cary* decision misapplied the Act's "no fault" concept to a meretricious relationship.

The 1966 report of the Governor's Commission on the Family, which later became the basis of the Family Law Act, suggests by exclusion that the "no fault" doctrine was meant to be strictly limited to the marital context. In recommending proposals for a change of the state's laws relating to the family, the Commission had urged that:

> the existing fault grounds of divorce and the concept of technical fault as a determinant in the division of community property, support and alimony be eliminated, and that marital dissolution be permitted only upon a finding that the marriage has irreparably failed, after penetrating scrutiny and after the parties have been given by the judicial process every resource in aid of conciliation.[122]

Two articles subsequently written by members of the Governor's Commission make it clear that its "no fault" recommendations were directed only to the grounds for divorce, the disposition of marital property, and the award of alimony and support.[123] Neither makes any reference which would indicate that property rights of meretricious spouses were meant to be affected.[124]

The Commission's recommendations concerning the "no fault" concept were adopted in the Family Law Act without change,[125] which presumably indicates that the legislature, too,

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121. *Id.* at 352-53, 109 Cal. Rptr. at 866.

122. REPORT OF THE GOVERNOR'S COMMISSION ON THE FAMILY 1-2 (1966).

123. Amicus Brief, *supra* note 13, at 31, *citing* Dinkelspiel & Gough, *A Family Court Act for Contemporary California: A Summary of the Report of the Governor's Commission on the Family*, 42 CAL. ST. B.J. 363 (1967) *and* Kay, *A Family Court: The California Proposal*, 56 CALIF. L. REV. 1205 (1968).

124. *Id.*

125. Amicus Brief, *supra* note 13, at 31-32, *quoting* Krom, *California's Divorce Law Reform: An Historical Analysis*, 1 PAC. L.J. 156, 170 (1970). The recognized grounds for divorce were reduced from seven to two, "irreconcilable differences" and

intended that the "no fault" policy be limited to marriages and marital dissolutions. *Cary's* extension of the "no fault" concept to a meretricious relationship was, therefore, in error.

Carrying this misconception to its logical conclusion, the *Cary* court also decided that Civil Code section 4452[126] of the Family Law Act defined the property rights of meretricious spouses, although the statutory language is limited to putative spouses.[127] Again, however, the legislative history behind Civil Code section 4452 suggests the error of the interpretation. The original recommendation of the Governor's Commission on the Family was merely that the legislature codify the then judicially recognized property rights of a putative spouse.[128] No mention was made of the rights of a meretricious spouse. In the draft of the Family Law Act which was proposed in the Commission's report, the members incorporated their recommendations in sections 014b and 014c.[129] The official comments in the proposed draft following those sections stated:

> Section 014b essentially codifies existing case law. . . . It is the intent of the Commission that Sections 014b and 014c cover both the case of a marriage which is void because bigamous or consanguinous, and the case of an attempted marriage which is invalid because of failure to

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"incurable insanity." CAL. CIV. CODE § 4506 (West 1970). More importantly, Civil Code section 4800 was adopted which eliminates fault as a basis for dividing property. Courts must now divide the community property and the quasi-community property of the parties equally. CAL. CIV. CODE § 4800 (West 1970).

126. CAL. CIV. CODE § 4452 (West Supp. 1976) provides:

> Whenever a determination is made that a marriage is void or voidable and the court finds that either party or both parties believed in good faith that the marriage was valid, the court shall declare such party or parties to have the status of a putative spouse, and, if the division of property is in issue, shall divide, in accordance with Section 4800, that property acquired during the union which would have been community property or quasi-community property if the union had not been void or voidable.

127. *In re* Marriage of Cary, 34 Cal. App. 3d 345, 352, 109 Cal. Rptr. 862, 865-66 (1973).

128. Amicus Brief, *supra* note 13, at 40, *quoting* REPORT OF THE GOVERNOR'S COMMISSION ON THE FAMILY at 46 (1966). The report stated:

> It was the Commission's opinion that some protection was needed for a good-faith spouse in a void marriage, especially one of long duration. Though the property rights of a putative spouse are generally recognized in present decisional law, it was deemed wise to spell out by statute the right of such "innocent" spouse to an interest in the "quasi-marital property" and to support by analogy to the laws governing the division of property and alimony in the case of valid marriages.

Id.

129. REPORT OF THE GOVERNOR'S COMMISSION ON THE FAMILY at 75 (1966).

meet the essential requirements of licensing or solemnization.[130]

Eventually the Commission's recommendations were embodied in Civil Code sections 4452 and 4455.[131] Soon after the legislation was passed, the Executive Director of the Governor's Commission commented on the Family Law Act, comparing it to the Commission's original recommendations.[132] Noting that the act in section 4452 gave statutory recognition to California case law protecting the putative spouse, he made no reference to relationships between meretricious spouses.[133] In view of the recommendations made to the legislature and the complete correspondence between those recommendations and the literal interpretation of the sections, it appears that the legislature had no intention of including anyone within the ambit of 4452 but good faith putative spouses.[134]

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130. *Id.* at 76.

131. CAL. CIV. CODE § 4455 (West Supp. 1976) provides:

> The court may, during the pendency of a proceeding to have a marriage adjudged a nullity or upon judgment, order a party to pay for the support of the other party in the same manner as if the marriage had not been void or voidable, provided that the party for whose benefit the order is made is found to be a putative spouse.

132. Amicus Brief, *supra* note 13, at 45-46, *quoting* Gough, *Community Property and Family Law: The Family Law Act of 1969*, CAL LAW 273, 278-79 (1970).

133. *Id.* Besides commenting on section 4452, Executive Director Aidan Gough commented on section 4455 and criticized its language. Subsequently, in 1970, the legislature amended 4455 to conform with these criticisms. Amicus Brief, *supra* note 13, at 46-47, *citing* Cal. Stats. (1970), ch. 1545, at 3139 (West Leg. Serv.). This indicates that the legislature accepted Gough's interpretation of the code sections.

134. The *Cary* court interpreted Civil Code section 4452 so as to be consistent with the "no fault" objective of the Family Law Act, although it meant giving the section a meaning which the language does not suggest. *In re* Marriage of Cary, 34 Cal. App. 3d 345, 351-53, 109 Cal. Rptr. 862, 865-66 (1973). The court noted that section 4452 awards half the quasi-marital property to a spouse who has deceitfully led his mate to believe they were married even though the property involved may have been accumulated largely as the result of the efforts of the innocent party. *Id.* at 342, 109 Cal. Rptr. at 865-66. From this premise, the court concluded that it would be inconsistent to deny judicial aid to a meretricious spouse who had been honest with her mate about their unmarried relationship. *Id.* Presuming that the legislature would not intend to create inconsistent provisions, the court held that section 4452 should be interpreted in view of the new general "no fault" policy underlying the entire Family Law Act. *Id.* at 352-53, 109 Cal. Rptr. at 865-66. It was the intent of the Act to disregard "guilt" in determining family property rights, according to the court, and, consequently, section 4452 should not preclude a "guilty" meretricious spouse from recovery in view of the fact that it guarantees half the property to a putative spouse's equally "guilty" deceitful partner. *Id.* at 352-53, 109 Cal. Rptr. at 865-66.

The core of the problem with the *Cary* court's reasoning regarding the proper interpretation of section 4452 is its emphasis on the remedy the section provides for meretricious cohabitators who have deceived their putative partners into thinking they

Post-Cary Appellate Decisions

Appellate decisions handed down after *Cary* have done little to clarify the legal theories upon which a meretricious spouse may base a recovery.[135] The first appellate opinion to deal with a meretricious situation after *Cary* was *In re Estate of Atherly*.[136] The *Atherly* majority agreed with the *Cary* result, summarizing the reasoning of the earlier opinion with approval.[137] However, in the next appellate decision, *Beckman v. Mayhew*,[138] the court declined to adopt the *Cary* rule, properly observing that the decision was based on a misinterpretation of the Family Law Act.[139]

The most recent "meretricious" decision, *Marvin v. Marvin*,[140] is presently pending before the California Supreme Court. *Marvin* is distinguishable from *Cary* because the plain-

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were married. Concededly, a "guilty" meretricious spouse would be allowed to retain half the property upon the dissolution of a putative-meretricious relationship. CAL. CIV. CODE § 4452 (West 1970); *see* note 126 *supra*. However, one can reasonably conclude from the structure of sections 4452 and 4455 that any relief afforded the meretricious spouse was incidental to the legislature's primary objective of defining the property rights of putative spouses; neither statute so much as mentions meretricious spouses. CAL. CIV. CODE §§ 4452, 4455 (West 1970); *see* notes 126 & 131 *supra*. Accordingly, *Cary's* apparent emphasis on the property rights guaranteed to deceitful meretricious spouses in a relationship with a putative partner was misplaced. The majority should not have used that aspect of the statute as a basis from which to construe the meaning of the whole section.

135. An inventive attorney in Menchaca v. Hiatt, 59 Cal. App. 3d 117, 130 Cal. Rptr. 607 (1976), tried to use *Cary* to argue that meretricious plaintiff Marina Lara was plaintiff Erasto Menchaca's "spouse" and therefore entitled to recover under Menchaca's insurance policy. *Id.* at 126, 130 Cal. Rptr. at 612. The court held that the rights under an insurance policy and the rights in jointly acquired property are sufficiently distinguishable to preclude its consideration and application of *Cary*. *Id.* at 126, 130 Cal. Rptr. at 613. The *Menchaca* majority noted that the case did not involve the division of jointly acquired property upon the separation of two participants in a meretricious relationship. Rather, it was concerned with the rights of a meretricious spouse against a *third party* insurance company. *Id.* at 127, 130 Cal. Rptr. at 613.

136. 44 Cal. App. 3d 758, 119 Cal. Rptr. 41 (1975).

137. *Id.* at 768-69, 119 Cal. Rptr. at 46-48.

138. 49 Cal. App. 3d 529, 122 Cal. Rptr. 604 (1975).

139. *Id.* at 534-35, 122 Cal. Rptr. at 607. Alternatively, the *Beckman* court indicated that it might have been persuaded to reject the *Vallera-Keene* doctrine because its policy of denying judicial relief to meretricious spouses on the basis of the "sinfulness" of the relationship was unrealistic in view of the social attitutes of the times. *Id.* at 535, 122 Cal. Rptr. at 607-08.

Few people would deny that social attitudes have drastically changed since the time *Vallera* and *Keene* were decided. Compare the beliefs of the average American today with the attitude of the *Vallera* appellate court. *See* note 1 and accompanying text *supra*.

140. Marvin v. Marvin, 50 Cal. App. 3d 84 (1975), *appeal docketed*, No. 30520, Cal. Sup. Ct., Sept. 17, 1975.

tiff sought recovery on the basis of an express agreement to contribute efforts and share earnings.[141] Nevertheless, the *Marvin* appellate court rejected *Cary*, as *Beckman* had, on the basis of its erroneous interpretation of the Family Law Act.[142] The trial court ruled that the *Marvin* agreement was unenforceable because it was made in contemplation of the illicit relationship. The appellate decision correctly noted that California precedent requires that agreements have an independent basis.[143]

THE CONSENTING ADULTS BILL, ASSEMBLY BILL 489

Before the California legislature passed Assembly Bill 489, adulterous cohabitation,[144] sodomy,[145] and oral copulation[146] were crimes. The Consenting Adults Bill removed criminal sanctions from adulterous cohabitation and private acts of sodomy and oral copulation between consenting adults.[147] But it is probable that both the purpose and the effect of A.B. 489 are more comprehensive than decriminalization of these acts. The bill can be viewed as official recognition by the legislature that relationships between consenting adults fall within an area of activity that should be free from government sanction.

The Legislative Intent

The legislative intent behind the Consenting Adults Bill is largely a matter of speculation; the legislature failed to draft an official statement of its purpose in enacting the bill. Since there also is no official record of the proceedings leading up to the passage of A.B. 489, the legislative intent must be inferred from the language of the bill itself and unofficial reports of the

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141. *Id.* at 88.

142. *Id.* at 96-97.

143. *Id.* at 98. *See, e.g.*, Trutalli v. Meraviglia, 215 Cal. 698, 12 P.2d 430 (1932); Garcia v. Venegas, 106 Cal. App. 2d 364, 235 P.2d 89 (1951).

Marvin was not tried on the merits, the Second District Court of Appeal having upheld the trial court's judgment on the pleadings. Marvin v. Marvin, 50 Cal. App. 3d 84, 88, 100 (1975). Consequently, it is not clear what significance the case will hold.

144. CAL. PEN. CODE § 269a (West 1970).

145. *Id.* § 286.

146. *Id.* § 288b.

147. Cal. Stats. (1975), ch. 71, at 144 (West Leg. Serv.). Criminal sanctions for sodomy and oral copulation were retained:

> (1) when the acts are committed with a minor or by force, violence, duress, menace, or threat of great bodily harm; and (2) where the participants are confined in state prison or specified detention facilities.

Id.

arguments which were instrumental in obtaining a legislative majority.[148]

The Consenting Adults Bill decriminalized private acts of sodomy and oral copulation between consenting adults. This public-private distinction would seem to indicate that the legislature was responding to a notion of privacy: private acts between consenting adults are of less interest to the state than those which are public. The reason for the distinction between public and private acts is not explicit, but it is probable that the legislature was recognizing that individuals have an overriding interest in being able to engage in a private relationship with another adult free from government intrusion. Support for this interpretation is provided by the bill's legalization of cohabitation, an activity with both a public and a private aspect. The decriminalization of the only type of cohabitation which was illegal, suggests that the prime motive of the legislature was to acknowledge that all relationships between consenting adults should be free from government intrusion.

In addition to the statutory language, a second indicator of the legislature's purpose in enacting A.B. 489 is the arguments that were instrumental in obtaining the bill's passage. Three arguments were reiterated as the bill passed through committee and onto the floor for debate: (1) the police are not capable of effectively enforcing laws against "victimless crimes;"[149] (2) the benefits obtained from enforcing the laws against oral copulation, sodomy, and adulterous cohabitation are slight when compared with the cost of enforcement; and (3) personal relationships are in an area of privacy where the government should not intrude.[150] Although it is impossible to

148. *See* note 150 and accompanying text *infra*.

149. As used in this context, "victimless crimes" are offenses in which there is no direct manifestation of harm or loss to physical being or property. Letter from Thomas H. Clarke, Jr., Counsel to the Assembly Committee on Criminal Justice, July 2, 1976 [on file with the SANTA CLARA L. REV.].

150. Thomas H. Clarke, Jr., is Counsel to the Assembly Committee on Criminal Justice, the standing committee which considered A.B. 489. He was present when the bill was discussed in committee as well as when it was debated on the floor. Clarke stated that three main arguments were instrumental in passing the bill in the Assembly. First, it was argued that the police are not able to effectively enforce laws against "victimless crimes." Second, a cost-benefit argument was made that the "benefits" obtained from enforcing the laws against non-forceful oral copulation, sodomy, and adulterous cohabitation were slight when compared with the cost of enforcement. Third, the common law argument was made that a man's home is his castle: an individual's activities in his own home are in a zone of privacy where the state should not intrude without substantial cause.

determine the extent to which the majority relied on any of the three arguments in voting on the issue, all were persuasive to some degree, and hence, the privacy argument can legitimately be recognized as one of the legislative objectives in enacting the bill.

The Consenting Adults Bill was authored by Willie Brown, Assemblyman for the 17th District. While Assemblyman Brown's opinion as to the legislative intent behind the bill is not dispositive, his extensive involvement in the passage of the bill gives his comments weight. Brown confirms that A.B. 489 was passed with the intent of officially recognizing that relationships between consenting adults are within an area of privacy which should be free from government sanction. According to Brown, the Consenting Adults Bill was meant to acknowledge that the state has adopted a policy of neutrality with respect to private relationships between adult citizens.[151]

A further significant confirmation of the legislative intent is the opinion of John Vasconcellos, the assemblyman who presented the privacy argument during the assembly debate and was active in pushing the bill through the assembly. Vasconcel-

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Clarke stated that in his opinion the "privacy" argument was the one which pursuaded the majority of assemblymen to vote for the bill. Elaborating on the argument, he said that its underlying philosophy was that people should be free to carry on any type of relationship as long as no one is harmed. Interview with Thomas H. Clarke, Jr., Counsel to the Assembly Committee on Criminal Justice, in Sacramento, Calif., Feb. 11, 1976 [a summary of which is on file with the SANTA CLARA L. REV.].

Verification of the arguments that were influential in pushing the Consenting Adults Bill through the Senate was provided by John Jervis, a consultant to former State Senator George R. Moscone when he was floor leader and the primary sponsor of the bill. From his memory of the proceedings, Jervis recalled that three major arguments were also made in the Senate: (1) "victimless crimes" laws should not be enforced because they are a "waste" of law enforcement's time and resources; (2) private acts between consenting adults are in an area of privacy where the government should not intrude; and (3) the state should not interfer with people's private relationships. Letter from John Jervis, consultant to Senate Democratic Caucus, July 7, 1976 [on file with the SANTA CLARA L. REV.].

151. Willie L. Brown, Assemblyman from the 17th District and author of the Consenting Adults Bill, responding to questions regarding the legislative intent behind the bill, agreed that A.B. 489 was passed by the legislature with the idea of officially recognizing that relationships between consenting adults and activities conducted during these relationships come within an area of privacy which should be free from government intrusion. Brown also verified that the Consenting Adults Bill was meant to acknowledge that the state should no longer penalize consenting adults for the type of relationships in which they choose to participate. Furthermore, Brown agreed that the legislature did not intend to condone any particular types of relationships between consenting adults, but it did intend that the state should be neutral toward them. Letter from Willie L. Brown, Assemblyman from the 17th District, February 25, 1976 [on file with the SANTA CLARA L. REV.].

los believes that the legislature intended to make it clear that people have a right to relate to one another in any manner they desire. The government has an affirmative duty to leave people alone, absent a need to protect the young or those forcefully approached. According to Vasconcellos, this right of individuals to relate freely to one another may be described in terms of privacy, although the terminology is not imperative.[152]

EFFECT OF THE CONSENTING ADULTS BILL ON REMEDIES FOR MERETRICIOUS SPOUSES

Both Justice Peters, dissenting in *Keene*, and the *Cary* court argued that in California meretricious spouses have been denied property rights because the courts have refused on principle to grant relief to persons engaged in a "sinful" relationship.[153] The inadequate, even nonexistent reasoning displayed in judicial opinions on the subject indicates that most often the issue was decided on the grounds of a public policy against assisting "sinful" cohabitators. The rule of law established by these decisions should be reconsidered, in view of the new state policy evidenced by the enactment of the 1975 Consenting Adults Bill.[154] A.B. 489 indicates that the state has officially

152. Assemblyman John Vasconcellos from the 23rd District spoke out in favor of the Consenting Adults Bill when it was debated on the Assembly floor. Vasconcellos stated that he believed that the legislative intent behind A.B. 489 was to acknowledge that it is "not the government's business what people do in their personal lives and relationships, absent a need to protect someone like kids or people being forcefully approached." The Assemblyman agreed that the legislature intended to recognize that relationships between consenting adults are in an area of privacy where the state should not intrude. According to Vasconcellos, the legislative intent can be put very simply—the intent was that the law should "just leave people alone, condoning people's rights to relate however they want." Vasconcellos stated:

> The Bill primarily dealt with acts rather than relationships. But the philosophy behind the Bill was more a question of personal rights and choices. Implicit in the personal rights argument is the relationship idea. Relationships are a function of rights. If the rights are there the relationships are legal or at least not a matter of legitimate government concern.

Interview with John Vasconcellos, Assemblyman for the 23rd District, in Sacramento, Calif., Feb. 11, 1976 [a summary of which is on file with the SANTA CLARA L. REV.].

153. Keene v. Keene, 57 Cal. 2d 657, 668-69, 371 P.2d 329, 336, 21 Cal. Rptr. 593, 600 (1962) (dissenting opinion); *In re* Marriage of Cary, 34 Cal. App. 3d 345, 349-50, 109 Cal. Rptr. 862, 864 (1973).

154. The legislature's amendment of Civil Code section 5118, CAL. CIV. CODE § 5118 (West 1970), and its enactment of the Uniform Parentage Act (S.B. 347), Cal. Stats. (1975), ch. 1244, at 3439 (West Leg. Serv.), indicate that California is placing less emphasis on the status of marriage than in the past. Before a 1971 amendment, the earnings of husbands who were separated from their wives were considered community property. Since 1972, however, a husband's earnings while permanently sepa-

acknowledged the private nature of personal relationships; the state will no longer penalize adults for the type of relationship in which they choose to participate. Consequently, the judiciary should no longer bar meretricious spouses from certain equitable remedies in the name of a policy that has been repudiated by the state legislature.

To assess A.B. 489's potential effect on the property rights of meretricious spouses, the rules governing the availability of various remedies will be re-examined.

Recovery Based on an Express Agreement

Both *Vallera* and *Keene* indicated that express agreements to pool earnings and share in accumulations are enforceable.[155] Appellate courts have liberally granted relief on express pooling agreements as well as agreements to compensate for services rendered. However, the appellate courts uniformly have insisted that the agreements cannot be based on the illicit meretricious relationship.[156] Although this requirement has been narrowly construed, *Marvin v. Marvin*[157] indicates that its impact can be decisive.[158]

The Consenting Adults Bill should provide justification for upholding all express agreements, even if they are founded on the meretricious relationship. A.B. 489 in effect legitimatized all meretricious relationships, insofar as it established that the state has no interest in penalizing the parties. Consequently, if the meretricious relationship itself is consideration for an agreement, the agreement is no longer based on illegal consid-

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rated from his wife have been characterized as separate property. *Compare* CAL. CIV. CODE § 5118 (West 1970), *with* CAL. CIV. CODE § 5118 (West Supp. 1976). Thus, the legislature has deemphasized marriage, placing a premium on cohabitation.

Similarly, passage of the Uniform Parentage Act, Cal. Stats. (1975), ch. 1244, at 3439 (West Leg. Serv.), also lessens the potential effect of marriage by eliminating the distinction between legitimate and illegitimate children incident to which the law confers or imposes rights and obligations. *Id.* at 3439-41. From the effective date of S.B. 347, the parent and child relationship, determined without regard to the parent's marital status, establishes a child's lawful status. *Id.* at 3440-41.

155. Keene v. Keene, 57 Cal. 2d 657, 662, 371 P.2d 329, 332, 21 Cal. Rptr. 593, 596 (1962); Vallera v. Vallera, 21 Cal. 2d 681, 685, 134 P.2d 761, 763 (1943).

156. *See, e.g.*, Trutalli v. Meraviglia, 215 Cal. 698, 701, 12 P.2d 430, 431 (1932); Croslin v. Scott, 154 Cal. App. 2d 767, 771-72, 316 P.2d 755, 758 (1957); Bridges v. Bridges, 125 Cal. App. 2d 359, 363, 270 P.2d 69, 71 (1954); Garcia v. Venegas, 106 Cal. App. 2d 364, 368, 235 P.2d 89, 92 (1951); Hill v. Estate of Westbrook, 95 Cal. App. 2d 599, 602, 213 P.2d 727, 729 (1950).

157. Marvin v. Marvin, 50 Cal. App. 3d 84 (1975) (vacated).

158. *See* note 143 and accompanying text *supra*.

eration. More importantly, A.B. 489 indicates that the courts should not look to the morality of a living arrangement in granting or denying relief. Thus, courts no longer can validly refuse to enforce an express agreement because they construe it to be founded on an immoral relationship.[159]

Recovery Based on Contribution

Four aspects of the portions of the appellate decisions and the *Keene* opinion regarding recovery based on a meretricious spouse's contributions are either fallacious or inadequate, and consequently appear to be based on the court's unwillingness to help "sinful" plaintiffs. These aspects should be changed to reflect the state's new "no punishment" policy. In other respects the rules set out by the decisions should stand.

The district courts of appeal in *Baskett v. Crook*[160] and *McQuin v. Rice*[161] noted several valid requirements for the imposition of a resulting trust. However, the court in *Baskett v. Crook*[162] held that the meretricious spouse in the case had to establish a clear intent to create the trust at the time the assets in question were acquired[163]—a requirement unsupported by precedent.[164] The court further indicated its prejudice by citing *Bertelsen v. Bertelsen*,[165] thereby implying that meretricious spouses have to overcome the inference that "funds" they contributed were payment for prositution.[166]

The supreme court also reiterated established resulting trust requirements in *Keene v. Keene*.[167] The crux of the *Keene* holding has a clear basis in legal precedent: resulting trusts have never been imposed in consideration of services rendered

159. There may be a problem with this analysis stemming from the Consenting Adults Bill's failure to legalize prostitution. An agreement which is solely a contract for prostitution will still be unenforceable. However, it is possible to distinguish an agreement based on a meretricious relationship from one based on prostitution. Perhaps the continuing and extensive interaction between the spouses in a meretricious relationship could be considered to be different than the money-for-sex bargain which the law has tried to avoid. Alternatively, in the case of an express agreement to compensate for services, the court could compensate the spouse for all the activities she performed for her mate except for engaging in sexual relations with him.

160. 86 Cal. App. 2d 355, 195 P.2d 39 (1948).

161. 88 Cal. App. 2d 914, 199 P.2d 742 (1948).

162. 86 Cal. App. 2d 355, 195 P.2d 39 (1948).

163. *Id.* at 362, 195 P.2d at 44.

164. *See* notes 66-67 and accompanying text *supra*.

165. 7 Cal. App. 258, 94 P. 80 (1907).

166. *See* notes 68-69 and accompanying text *supra*.

167. 57 Cal. 2d 657, 371 P.2d 329, 21 Cal. Rptr. 593 (1962).

to improve property once it has been purchased.[168] But the *Keene* court came to two dubious conclusions. The court misinterpreted *Vallera* to state that a meretricious spouse can recover in proportion to the consideration she has furnished toward the acquisition of assets during the relationship only when the consideration is not in the form of "services."[169] Justice Peters, dissenting, correctly pointed out that the *Vallera* court in fact had implied that services are adequate as consideration.[170] Furthermore, the *Keene* majority stated that resulting trusts only have been imposed when the grantor had conveyed property in payment for the benficiary's services.[171] Contrary to the *Keene* holding, resulting trust precedent has not required that any conveyance be in payment for services rendered.[172]

The *Keene* decision's inaccurate interpretation and loosely reasoned observations concerning the services which will justify a resulting trust on a contribution theory suggest that the holding was based in part on the "guilt" policy rather than on legal principles related to the resulting trust remedy. Since the Consenting Adults Bill repudiates that policy, this aspect of the *Keene* rule has been superseded, and that fact should be acknowledged by the California courts.

In addition, if the new state policy indicates that the state has no interest in punishing consensual relationships, then certainly a participant in a meretricious relationship seeking a resulting trust remedy should not have to meet the *Baskett v. Crook*[173] requirement that she establish that the parties intended to create a trust when other plaintiffs bear no such burden.[174] Moreover, a meretricious plaintiff should not have to refute the inference suggested by the *Baskett* court that the relationship was actually prostitution.[175]

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168. *See, e.g.*, Hellman v. Messer, 75 Cal. 166, 170, 16 P. 766, 768 (1888); Neusted v. Skernswell, 69 Cal. App. 2d 361, 368, 159 P.2d 49, 52 (1945). The other technicalities noted by the court are also an accurate statement of the law. *See, e.g.*, Plass v. Plass, 122 Cal. 3, 13, 54 P. 372, 376 (1898); Woodside v. Hewel, 109 Cal. 481, 484-85, 42 P. 152, 153 (1895).

169. *See* notes 79-80 and accompanying text *supra*.

170. *See* notes 100-04 and accompanying text *supra*.

171. *See* note 84 and accompanying text *supra*.

172. *See* notes 88-92 and accompanying text *supra*.

173. 86 Cal. App. 2d 355, 195 P.2d 39 (1948).

174. *See* notes 66-67 and accompanying text *supra*.

175. *See* note 69 and accompanying text *supra*.

Recovery on Implied Contracts

California courts have never dealt squarely with the issue of quasi-contractual recovery for a meretricious spouse. No case sets forth the requirements for the remedy and demonstrates that they cannot be satisfied by a meretricious spouse. Instead, both *Keene* and the decisions of the courts of appeal have denied recovery because the "equitable considerations arising from the reasonable expectation of the continuation of benefits attending the status of marriage" are absent in the case of a meretricious spouse.[176] The analysis assumes that expecting compensation for services rendered during a relationship necessarily is expecting a benefit "attending" the status of marriage. This assumption simply cannot be supported. As Justice Peters remarked, it is entirely reasonable and proper for persons to expect fair treatment in their dealings with others, and it is the business of the courts to apply available equitable remedies to achieve that result.[177] The flat prohibition against quasi-contractual recovery for a meretricious spouse is the product of the courts' consideration of the "sinfulness" of the relationship, and the Consenting Adults Bill would justify revising the rule to allow recovery on a contract implied-in-law theory in any case where the general requirements for the remedy are met.

The same analysis is applicable to claims for recovery based on a contract implied-in-fact theory, which the *Keene* court conceded would be available to a plaintiff who fulfilled the requirements.[178] With the policy and consideration difficulties solved by the demise of the erroneous *Keene* rule, there is no reason why a meretricious spouse should not, in a proper case, recognize and enforce an implied contract.[179]

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176. *See* notes 29-36, 57-61, 97 and accompanying text *supra*.

177. *See* notes 106-10 and accompanying text *supra*.

178. *See* note 93 and accompanying text *supra*.

179. A contract implied-in-fact theory might allow a meretricious spouse to recover half the property accumulated during the relationship under certain circumstances. Civil Code section 1621 states that both the existence and the *terms* of an implied contract are manifested by the conduct of the contracting parties. CAL. CIV. CODE § 1621 (West 1973). It is conceivable that meretricious spouses attempting to carry on a relationship without the potential problems created by divorce and alimony, may manifest through conduct their actual expectation that the property accumulated will be divided equally. An equal division may seem equitable to the parties because they both have contributed all their time and effort to the relationship, although there may be a discrepancy in the "market" value of each of their services.

Obviously, there would be a problem in establishing that both parties to the relationship actually expected to equally divide the property. The most valid indica-

Recovery in a "Family" Situation

The *Cary* decision, which permitted equal division of accumulated assets under the provisions of the Civil Code, was based in part on the premise that meretricious spouses had been refused the protection of California's community property laws because of the illicit status of the relationship.[180] If that were true, then perhaps the policy behind the Consenting Adults Bill, which does effect the policy change *Cary* erroneously attributed to the Family Law Act, would justify the *Cary* result: equal division of the assets of a meretricious couple. However, *Cary's* premise does not appear to be well founded. *Vallera* denied a meretricious spouse an interest in half the property accumulated because she did not have the expectations of a married spouse. By reason of cohabitation *alone*, the court held, the spouse does not have a reasonable expectation of receiving the benefits of marriage.[181] That is, she cannot reasonably expect to enjoy the benefit of the community property laws.

If a spouse is married, she can expect to receive half the property accumulated in the relationship solely because she is married; half the property has arbitrarily been allocated to her, regardless of the value of any contributions she has made during the relationship.[182] A meretricious spouse, on the other hand, does not, by virtue of cohabitation, qualify for the artificial property rights guaranteed by the community property laws of the state, anymore than she qualifies for workmen's compensation or any other statutory right with stated prerequisites. Consequently, she cannot validly claim that she has been penalized for the "sinfulness" of her conduct because she has not been allowed to recover half the property. Like any other party in a non-marital situation, a meretricious spouse must prove that she has some right to half the property on the basis of consideration she has provided. To deny a meretricious spouse relief if she fails to do so involves no policy of punish-

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tors of the necessary expectation would be each party's equal time investment and consistent efforts evidencing fair dealing. In addition, if the parties were engaged in a "family-type" relationship this might indicate that they intended to adopt a "community-property" type property division as the most equitable in a "community effort" family situation. They may have chosen to remain unmarried only to avoid the legal problems inherent in divorce and alimony, for example, if both spouses had a bad experience going through a previous divorce.

180. *See* note 119 and accompanying text *supra*.

181. *See* notes 29-36 and accompnying text *supra*.

182. CAL. CIV. CODE § 4800 (West 1970).

ment, and is perfectly consistent with the professed neutrality of the state on the moral issue. *Cary* is still bad law.

CONCLUSION

Although the new "no punishment" policy embodied in the Consenting Adults Bill may open up the full spectrum of legal remedies to meretricious spouses, a very real problem still confronts them: fulfilling the legal requirements for these remedies is difficult for a plaintiff in a domestic context. Certainly, a major obstacle will be establishing that services were rendered with a legally cognizable expectation of payment. The business-like outlook which a meretricious spouse would have to take in order to assure evidence of the type of expectation courts appear to demand is something people attempt to exclude from their private personal lives.

Justice Peters, in his *Keene* dissent, implied that the major way in which meretricious spouses have been punished for their status is in the courts' refusal to exercise their broad, remedy-shaping equitable powers to assist such plaintiffs.[183] However, if courts are too lenient and allow a meretricious spouse to recover property without insisting upon a legally acceptable basis for recovery, they are effectively legitimizing marriage by consent, which is not recognized in California.[184]

The court must strike a balance, permitting meretricious spouses to recover whatever interest in accumulated assets they have "earned," while prohibiting any artificial recovery-of-right analogous to the property settlement required by the community property laws upon the dissolution of a marriage. In this way, unjust enforcement will be prevented, but those individuals who have specifically chosen to avoid marital obligations will be able to continue to do so.

Paul H. Miller

183. *See* notes 106-10 and accompanying text *supra*.

184. CAL. CIV. CODE § 4100 (West 1970).